Editor's note: 95 I.D. 49

STATE OF IDAHO

IBLA 85-355 Decided March 23, 1988

Appeal from a decision of the Idaho State Office, Bureau of Land Management, dismissing protest against mineral patent applications I-16043 and I-16044.

Reversed, hearing ordered.

1. State Grants

The Idaho Admission Act of July 3, 1890, granted the State sec. 16 and 36 in every township in Idaho for the support of the common schools. For sections already surveyed, this grant was immediately effective. For land surveyed after admission, title did not pass to the State until approval of the survey of the affected section. If land was mineral in character on the date of survey, title did not pass to the State until Jan. 25, 1927, when Congress extended school grants to lands that were mineral in character, excluding lands "subject to or included in any valued application, claim, or right * * * unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled."

2. Evidence: Presumptions -- State Grants

There is a presumption which exists, until the contrary is shown, that land granted to a state for school purposes was of the character contemplated by the grant insofar as its mineral or nonmineral character is concerned.

3. State Grants

Because an application for a mineral patent falls within the circumstances enumerated in the statute providing for the grant of mineral lands to states for school sections, 43 U.S.C. § 870 (1982), the filing of such an application provides the Secretary of the Interior jurisdiction to determine the mineral character of land subject to a state grant.

4. State Grants

A mineral return upon the filing of the survey of a state school section does not have effect to establish the character of the lands as chiefly valuable for mineral, and cannot of itself operate to take school lands out of the grant to the state. A mining claimant, not the state, bears the ultimate burden of proving the land was mineral in character at the date of admission or the date of survey.

5. State Grants

Before a mineral classification can become conclusive to a state's interest in a school section, notice and an opportunity for a hearing must be provided.

6. Mining Claims: Contests -- Mining Claims: Patent -- Rules of Practice: Private Contests -- School Lands: Mineral Lands -- State Selections

If a mineral patent application filed after January 27, 1927, describes land within a numbered school section, BLM may not take favorable action upon the mineral patent application until the conclusion of a private contest proceeding, unless such lands have been previously accepted as lands for a state lieu selection.

APPEARANCES: Robert J. Becker, Esq., Boise, Idaho, for appellant; Michael K. Branstetter, Esq., Wallace, Idaho, for Big Creek Apex Mining Company.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The State of Idaho has appealed from the December 19, 1984, decision of the Idaho State Office, Bureau of Land Management (BLM), dismissing the State protest against mineral patent applications I-16043 and I-16044, filed by Big Creek Apex Mining Company to patent the Snow Storm and Snow Slide lode mining claims. The patent applications were filed on September 24, 1979. The Snow Storm claim was located on January 1, 1890, and is described by M.S. 3325 as situated in secs. 15 and 16, T. 48 N., R. 3 E., Boise Meridian, Idaho. The Snow Slide claim, located on January 1, 1892, is described by M.S. 3341 and is situated in sec. 16 of the same township.

[1] Idaho's interest in this matter arises from section 4 of the Idaho Admission Act of July 3, 1890, ch. 656, 26 Stat. 215, which granted secs. 16 and 36 in every township of the State to Idaho for the support of common schools. For sections already surveyed, this grant was immediately effective. For land surveyed subsequent to the enactment of this provision, title did not vest until approval of the survey of the section. See United States v. Wyoming, 331 U.S. 440, 443-44 (1947), and cases cited therein. A survey of sec. 16 T. 48 N., R. 3 E., was approved on November 29, 1912. The character of the land in sec. 16 on that date is significant, since if the land was mineral in character on the date of survey, title did not pass to the State until January 25, 1927, when Congress extended grants in aid of the common or public schools to lands that were mineral in character, 43 U.S.C. § 870 (1982). Subsection (c) of section 870 provides: "[a]ny lands * * * subject to or included

in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled, * * * are excluded from the provisions of this section." Thus, the Snow Storm and Snow Slide mining claims were not excluded from this grant unless they were shown to be valid on January 25, 1927. Even if the claims were valid before that date, they could have become invalid by mining out the discovered mineral or by a market change making the mineral unmarketable at a profit. Under the clear provision of the 1927 Act, the State's title would attach at such time.

Patent applications for the subject claims were filed on September 24, 1979. On November 8, 1979, the State of Idaho filed a request that it be notified of the publication of any mineral application concerning these claims. No notice of mineral application was published until February 1982, and on March 31, 1982, the State submitted a letter for the purpose of declaring its interest in the matter but indicated that the letter was not intended as a protest. The letter was accompanied by a copy of a decision by the Director, BLM, dated November 27, 1953, concerning a State indemnity selection application in which the State had assigned as base-land part of sec. 16, T. 48 N., R. 3 E., Boise Meridian, alleging that such land was lost because mineral land had been patented. The 1953 BLM decision stated:

> All lands outside the patented mining claims may be presumed to have passed to the state under the original granting act on the acceptance of the plat of survey, if not then known to be mineral in character. If the lands were then known to be mineral in character, they passed to the state under the Act of January 25, 1927 * * *.

Accordingly, the 1953 decision considered only land which had already been patented to be lieu land; title to land within unpatented mining claims was presumed to have passed to the State.

In its March 31, 1982, letter to BLM, the State refers to a memorandum from the Chief, Branch of Mining, Division of Minerals, to the Director, BLM, dated November 25, 1953, indicating that the State owns 31.85 acres in lot 12 and 38.27 acres in lot 11, the same lands encompassed within the Snow Storm and Snow Slide patent applications. The State's letter acknowledges that issuance of a patent could be proper if the applicant could prove a valid location prior to the Act of 1927, but, the State contends, if patents are issued then the State would be entitled to lieu selections mineral in character for the patented land. Mineral entry final certificates were issued by BLM on December 7, 1982. Both mineral entry certificates are made subject to later verification of discovery of valuable mineral on the claim.

On February 4, 1983, the State filed a protest against issuance of patent followed by an amended protest filed on July 21, 1983. The amended protest asserts title to mineral rights under the Act of January 25, 1927, also refers to the prior BLM decision that title to the land is in the State, and asserts that the patent applicants are required to demonstrate the following:

> a. That their claims were properly located with valid discoveries thereon prior to January 25, 1927, and if relying on claims by alleged predecessors in title, the validity of their chain of title to such claims.

b. An actual discovery of minerals on the surface of these claims at the date of filing of the applicant's earliest claim and/or (sic) prior to January 25, 1927, and that such actual discovery, continued from the date of filing of the applicants' earliest claim to the present date.

c. That said actual discovery satisfied both of the following tests continuously from the date of filing of their earliest claim to the present date:

1. That the discovery is of such a character that a person of ordinary prudence would expend time and money to develop the minerals for a profit; and

2. That the minerals can be extracted and marketed at a profit.

d. That the lands under these claims were mineral in character as of November 19, 1912, which is the date of survey of this Section 16.

The State requested a hearing and that all proceedings be stayed until after hearing and a determination on the merits by a proper officer.

In its answer to the State's protest, Sunshine Mining Company (Sunshine), the successor in interest to Big Creek Apex Mining Company's patent applications, stated that the Department had classified the land as mineral in 1898, 14 years before the section was surveyed and returned as mineral in character by the survey approved on November 29, 1912. In response to the State's assertion that the land would otherwise have passed to the State under the 1927 statute, the claimant contends that the claims were valid at that time, citing testimony from private litigation, Sunshine Extension Mines, Inc. v. Coeur d'Alene Big Creek Mining Co., No. 1296 (D. Idaho 1936).

In rejecting Idaho's assertion that the land was granted under the Enabling Act, BLM held:

> The survey for T. 48 N., R. 3 E., B.M., was approved November 29, 1912. The State argues the lands were nonmineral in character on the date of survey and title vested to the State.
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> * * * * * * *
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> The history of the area demonstrates section 16 was mineral in character on the date of survey. The Department of the Interior classified the land as mineral in character on February 5, 1898. Classification of section 16, T. 48 N., R. 3 E., B.M., as mineral in character was made under the provisions of the Act of February 26, 1895, 28 Stat. 683, whereby Congress provided for "the examination and classification of certain mineral lands in the states of Montana and Idaho." A March 30, 1898, report to the Commissioner, General Land Office in Washington, D.C., indicated no protests were filed against the classification of section 16 as mineral in character. On August 22, 1898, the Secretary of the Interior approved the classification. In addition, numerous patented and unpatented mining claims existed in section 16 in 1912.
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> The State argues that if the land was mineral in character in 1912, title vested to the State under the Act of January 25, 1927. The act did grant mineral-in-character, numbered school sections to the States. However, excluded from the provisions of the act were those lands "subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled. . ." Snow Storm and Snow Slide were excluded from the provisions of the act because they were lands "subject to or included in any valid application, claim, or right."

In view of the fact that BLM's mineral report recommended a patent for each claim, BLM's decision held the State of Idaho had the burden of proving that no valid discovery existed on the claims, citing In re Pacific Coast Molybdenum Co., 75 IBLA 16, 90 I.D. 352 (1983), and 2 Am. Law of Mining, § 9.26 at 354 (1982). The BLM decision then dismissed the State's protest finding that the State had not shown the patent applicant had failed to make a valid entry. The question on appeal, therefore, is whether BLM correctly dismissed Idaho's protest for failure to show that title to the land encompassed by these two claims had vested in the State in 1912 or 1927.

We will first discuss the effect of the Enabling Act and the 1927 Act. These statutes purport to convey title, and because Idaho's protest raises an issue concerning title to sec. 16, it necessarily raises a question concerning this Department's jurisdiction to adjudicate this matter. If title to the land in question was conveyed either by the Statehood Act or by the Act of January 1927, the Department lacks jurisdiction to consider a mineral patent application to this land.

[2] In Margaret Scharf, 57 I.D. 348 (1941), Assistant Secretary Chapman stated that there is a presumption, which exists until the contrary is clearly shown, that land granted to a state for school purposes was of the character contemplated by the grant insofar as its mineral or nonmineral character was concerned, and that title to a school section identified by survey has passed to the state. In that case, it was held that mere allegations to the effect that land granted for school purposes was mineral in character and that title therefore did not pass to the state, unsupported by evidence rebutting the presumption that title had passed to the state as nonmineral land, will not warrant this Department, upon an application for an oil and gas lease, to entertain proceedings for a determination of the mineral character of the land. (It must be kept in mind that the appeal now before us, however, involves an application for a mineral patent, not an oil and gas lease.)

[3] The Scharf decision further observed that the Department has jurisdiction to make conclusive determinations respecting the known mineral character of school lands at the effective date of the grant. The decision stated,

however, that such determinations will be made only pursuant to an application for a patent by the state or in the exercise of certain of the Department's functions. Those functions would be properly exercised in (1) determining whether the title to any lands which were clearly excepted from the 1927 Act had passed or failed to pass under the original school grant where sufficient evidence had been shown to rebut the presumption that title had passed under the original school grant, or (2) in passing on any dispute as to whether or not any of the circumstances enumerated in the 1927 Act actually existed or were sufficient to prevent title, which otherwise would pass under that Act, from passing thereunder. The Scharf decision held that a request for a determination of the mineral character of the land under any other circumstance would merely be a request for an advisory opinion which the Department will not usually render. Therefore, because an application for mineral patent falls within the circumstances enumerated in the 1927 Act, we have jurisdiction to determine this question.

[4] In considering whether BLM properly held that the land including the claims was mineral in character on November 29, 1912, we must first consider the effect of this classification. In State of Utah, 32 L.D. 117 (1903), the Department held that a mineral return by the Surveyor General does not establish the character of the lands as chiefly valuable for mineral, and cannot, of itself, operate to take lands out of the grant to the State. 1/ That

1/ In United States Mining Laws and Regulations Thereunder, 44 L.D. 247, 310 (1915), it is stated that "public land returned by the Surveyor-General as mineral shall be withheld from entry as agricultural land until the presumption arising from such a return shall be overcome by testimony taken in

decision also established that the mining claimant, not the State, carries the burden of providing evidence of mineral character at the date of admission or the date of survey.

[5] Before a mineral classification can become conclusive as to a state's interest in a school section, notice and an opportunity for a hearing must be provided. See State of Utah v. Bradley Estates, 223 F.2d 129 (10th Cir. 1955). It is not necessary that a hearing actually be held in such a matter; it is sufficient that a state be notified of the matter and be given an opportunity to be heard. Mahoganey No. 2 Lode Claim, 33 L.D. 37, 38 (1904). 2/

There have been relatively few reported decisions involving mining claims located on lands described by grants to states under their enabling statutes or the 1927 Act. One such case is Mangan & Simpson v. State of Arizona, 52 L.D.

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fn. 1 (continued)
the matter here and after described." Subsequent paragraphs of the regulation, however, make clear that this presumption applies against one who seeks to enter the land under an agricultural land law, and does not address the circumstance where the land at issue is subject to a present grant such as a railroad grant or a school grant. Id. at 310, 311. In other words, this is a circumstance presented when the classification is challenged by one seeking to enter the land, not by one who claims legal title to the land.

2/ The Mahoganey No. 2 Lode Claim decision involved a mineral location made prior to the admission of Utah to the Union. The Secretary noted that the location itself was not sufficient to establish the mineral character of the land so as to defeat the grant of school lands to the State. The decision also referred to the well-established presumption that such land passes to the State under the statutory grant. The General Land Office held that the applicants for the mineral patent were required to apply for a hearing on the matter, but the Secretary reversed this decision, on the ground that the State had been given an opportunity to protest and failed to do so.

266 (1928). In that case, it is clear that the original classification of the land as mineral in character did not by itself operate to preclude passage of title under the Enabling Act. It was only when, "[A]fter due notice, the State failed to deny the charges and apply for a hearing" that the mineral character of the land would be established. Id. at 267. In order to provide a basis for BLM's determination here, that the land in sec. 16 was mineral in character at the time of acceptance of the plat of survey, the case record transmitted with the appeal should include the record of proceedings by which the State was given notice and an opportunity for a hearing on this question and should show that a final determination of this issue was made for the Department.

In the Mangan case, it had been established that the N 1/2 N 1/2 of the granted section was mineral in character. The decision stated: "If the claim is within the limits of the N 1/2 N 1/2, is valid, and was located prior to January 25, 1927, the area of the claim is excepted from the force and effect of the grant of the later date, and the area is still public land of the United States, subject to an application for mineral entry." Id. at 268. The decision then states the procedures applicable in such a situation:

> If and when an application to make mineral entry is filed the State will have an opportunity to proceed against the entry if of the opinion that the claim is not based on a valid discovery made prior to January 25, 1927; or if the mineral claimants continue in possession of claim or claims, the State may institute proceedings to declare the claims invalid * * *.

Id. at 269.

Here, to support their conclusion the land in sec. 16 was mineral in character, BLM and the claimants rely on an 1898 classification made pursuant to the Act of February 26, 1895, ch. 131, 28 Stat. 683-86. That statute authorized the examination and classification of land within the land grant and indemnity land grant limits of the Northern Pacific Railroad Company. Specifically, this 1895 Act authorized examination of land in four districts of Idaho and Montana, one of which covered the area in which the subject claims are located, to ascertain the mineral character of the lands. Sunshine contends the decision of the Commissioners dated February 5, 1898, determined that all of sec. 16 embracing the subject claims was of mineral character. A notice was published, and on August 22, 1898, the Register reported to the Secretary the fact of publication and of failure to receive any protests. Sunshine contends that on that date, the Commissioners transmitted their report to the Secretary, making it a final determination that the lands were mineral in character.

Indeed, section 6 of the Act provides:

> That as to the lands against the classification whereof no protest shall have been filed as here and before provided, the classification, when approved by the Secretary of the Interior, shall be considered final, except in case of fraud, and all plats and records of the local and general land offices shall be made to conform to such classification.

(28 Stat. 685).

Although section 7 of the Act makes it clear that Congress intended primarily to preclude issuance of patents for mineral lands to the railroad,

the requirement in section 6 that all plats and records be made to conform to the classification was intended to have broader effect. Nevertheless, the 1898 classification could not be binding on the State of Idaho. Idaho had no interest in the land that could be affected by a mineral classification until approval of the official survey in 1912. Idaho was therefore under no obligation to protest the 1898 classification, and any failure to do so could not constitute a waiver of its right to notice and an opportunity for a hearing on the mineral character of the section involved in this appeal. 3/

The State of Idaho contends that although the claims were located in 1890 and in 1892, no assessment work was performed from 1909 to 1918. Amended locations were not made until December 1935, after the enactment of the 1927 Act. Idaho contends that, consequently, title to the land in question vested in the State in 1912 because of the lapse in assessment work between 1909 and 1918 and because the land had not been determined to have been mineral in

3/ Section 13 of Idaho's Enabling Act, which expressly states that all mineral land shall be exempted from the grants by the Act, further provides:

"But if sections sixteen and thirty-six, or any subdivision, or portion of any smallest subdivision thereof in any township shall be found by the Department of the Interior to be mineral lands, the said state is hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands in said State, in lieu thereof, for the use and benefit of the common schools of said State."

(26 Stat. 217 (1890), emphasis added). It appears that, pursuant to this provision, the State of Idaho may have accepted lands in lieu of certain mining claims located in the same section involved in this appeal. In view of the evident intent that the determination of lands mineral in character was to be based on the smallest legal subdivision, it follows that if Idaho has accepted a lieu selection on the basis of any patented mining claim intruding into the smallest legal subdivisions, embracing the claims involved in this appeal, the state has therefore acquiesced in the determination concerning the mineral character of these lands. The record before us does not indicate, however, whether any such selection has been made.

character. Although the lapse of assessment work would leave the land open to adverse locations, it does not support the conclusion that the land is nonmineral in character. Thus, assuming for the moment that assessment work was resumed in 1918 and that the claims were otherwise valid, title to the land would not have passed to the State in 1927.

Indeed, the evidence relied upon by the patent applicant and BLM were ample to establish a prima facie showing that the land was mineral in character at the time of the approval of the plat of survey. In Diamond Coal & Coke Co. v. United States, 233 U.S. 236, 239-40 (1914), the Supreme Court set forth the following test to determine the mineral character of land: "[I]t must appear that the known conditions * * * were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end." The Court further observed:

> There is no fixed rule that lands become valuable * * * only through * * * actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding or external conditions; and when that question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate.

Id. at 249. Further, the evidence relied upon by BLM in determining that the land was known to be mineral in 1912 does not appear to significantly differ from that cited by a court confronting a similar question in Laden v. Andrus, 595 F.2d 482, 489-90 (9th Cir. 1979). The Laden opinion, quoting from Diamond

Coal & Coke Co. v. United States, supra, first stated the rule for determining the mineral character of land to be: "[I]t must appear that the known conditions * * * were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end." Id. at 488. The Court then concluded that:

> The proper inquiry, thus, is not whether the [land] now contains, or ever did contain, a valuable mineral deposit. To paraphrase Diamond Coal & Coke, the relevant issue is whether the known conditions existing in 1901 were sufficient to engender the belief that the [land] contained minerals of a quantity that would render their extraction profitable and justify expenditures to that end.

Id. at 489.

While the State of Idaho is not barred by the principle of administrative finality or res judicata from raising the question whether the land in sec. 16 was mineral in character in 1912, the State has not made an offer of proof sufficient to question the historical evidence relied upon by BLM in its conclusion that the land was properly classified as mineral in character and excluded from the State grant. Before considering the effect this circumstance has upon the State's claim, we must consider whether the claims in sec. 16 were excluded from the statutory conveyance of January 25, 1927.

[6] In the proceedings before BLM, the State responded to the claimant's assertions on this issue as follows:

Basically, the testimony indicated the existence of "copper stains" and "green stains" in some of the tunnels on the Snow Storm and Snow Slide claims. Also there was testimony that this area was called the "Dry Belt of the Coeur d'Alenes." Presumably, this is Big Creek's basis for a valid surface discovery.

If so, such evidence does not constitute the discovery of a valuable mineral deposit as required by the "prudent man test" and the later enunciated "marketability test."

The "prudent man test" holds that a discovery has been achieved when one finds a mineral deposit of such quantity and quality that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455, 457 (1984), Chrisman v. Miller, 197 U.S. 313 (1905).

Later, in United States v. Coleman, 390 U.S. 599 (1968), the Supreme Court complemented the "prudent man test" with the "marketability test" requiring a claimant to show that a mineral can be extracted, removed, and marketed at a profit.

Mineralization that only justified further exploration in an effort to determine whether sufficient mineralization might be found to justify development does not constitute discovery of a valuable mineral deposit. Barton v. Morton, 498 F.2d 288 (9th Cir. 1974). Evidence of "copper stains" and that the claims were located in the "Dry Belt of the Coeur d'Alenes" is of geological inference only and cannot substitute for the actual finding of a vein of quartz or other rock bearing valuable deposits of minerals within the boundaries of the claim. United States v. Bechthold, 25 IBLA 77 (1976). Such an actual finding of a valuable mineral deposit must be made in order to support a valid discovery. United States v. Walls, 30 IBLA 333 (1977).

Because the land in question was transferred to the State on January 25, 1927 and as a result was withdrawn from further location, Big Creek must show that there was a valid discovery at the time of the transfer to the State was well as presently. United States v. Porter, 37 IBLA 313 (1978). This means that Big Creek must satisfy the "prudent man test" for a valid discovery as of January 25, 1927 and must additionally satisfy the "marketability test" presently at the time of patent application.

Even assuming there may have been a valid discovery at the time of transfer to the State on January 25, 1927, the claims in question here are not valid unless they are presently supported

> by a valid discovery. If the discovery is lost, so is the location lost. A valid discovery must be maintained up to the time that patent is issued. United States v. Wichner, 35 IBLA 240 (1978).

(State's Reply at 6-8). In dismissing Idaho's protest, it was held that the State had the burden of proof on these issues raised by the protest and that the material submitted by the State was insufficient to sustain that burden. To support this finding, BLM quoted from American Law of Mining for the proposition that: "If a protest is filed after the date of the mineral entry, the presumptions are in favor of the regularity and legality of the entry, and the protestant must rebut the force of this presumption * * *." Id. § 9.26 at 354 (1982). Reliance upon this authority is misplaced in this case for two reasons.

First, it ignores the fact that the State also enjoys the benefit of a presumption that, as was pointed out above in this opinion, the land in sec. 16 was legislatively conveyed, effective either in 1912 when the land was first surveyed under the 1890 Admission Act, or in 1927, when the Act of January 27, 1927, became effective. We are not free to simply ignore this circumstance.

Second, the mineral entries, both dated December 7, 1982, expressly reserve the question of discovery for later determination as to both the Snow Slide and Snow Storm claims. In this context, the date of a "mineral entry" is not the date on which a mining claim is located, although the term may have such meaning in informal usage. Here, the term "designate[s] the filing in

the Federal land office of an application for a mineral patent together with the notation of the application on the land office records." Am. Law of Mining § 30.02 (1986). The Department's decision in Elda Mining & Milling Co., 29 L.D. 279 (1899), is dispositive on this point. In that case, the Department ordered a hearing to resolve a conflict between a mining claimant and a homestead entryman. The homestead entry was made on June 13, 1896. The conflicting mineral application was filed on September 30, 1896, and mineral entry was made on December 28, 1898. Elda Mining makes clear that mineral entry occurs after the conclusion of adverse proceedings by other mining claimants under 30 U.S.C. § 29. In this case, the date of the final certificate of mineral entry is December 7, 1982.

The December 7, 1982 final mineral certificates state that "[p]atent may issue if all is found regular and upon determination and verification of a valid discovery of a valuable mineral deposit as subject to the reservations, exceptions and restrictions noted herein." The mineral entries in this case, therefore, were conditioned upon later proof of the existence of the validity of the claims. That issue still remains to be resolved, contrary to the conclusion stated by the BLM decision, and no presumption concerning the existence of the discovery of a valuable mineral on either claim exists by virtue of the mineral entries made in the case of these two claims.

On the record before us there is no evidence at all relating to this issue; except for the 1912 survey plat, there is nothing in the record pertaining to the actual condition of the land located within the two claims,

although there is apparently a mineral report in existence which was used by BLM to reach some of the conclusions reached in the letter dated November 1, 1953, which made certain conclusions concerning the amount of land which had been conveyed to the State in sec. 16 by operation of law.

In Mangan v. Arizona, supra at 269, the Assistant Secretary stated with respect to claims located prior to January 25, 1927:

> If and when an application to make mineral entry is filed the state will have an opportunity to proceed against the entry if of the opinion that the claim is not based on a valid discovery made prior to January 25, 1927; or if the mineral claimants continue in possession of the claim or claims, the state may institute proceedings to declare the claims invalid; but a contest against the state by the mineral claimant at this time is unnecessary, and will not be entertained.

The instructions issued after enactment of the 1927 Act have been codified in part, to state:

> Should the validity of any such claim be questioned by the state, proceedings with respect thereto by protest, contest, hearing, etc., will be had in the form and manner prescribed by existing rules governing such cases. This procedure will be followed in the matter of all protests, contests, or claims filed by individuals, associations, or corporations against the states affecting school-section lands.

43 CFR 2623.2(a).

We must also observe that 43 CFR 3872.3 provides: "Public land returned upon the survey records as mineral shall be withheld from entry as agricultural

land until the presumption arising from such a return shall be overcome." Section 3872.4 specifies the procedure involved in disputing the record character of land which is sought to be entered as agricultural. These provisions, however, are limited to circumstances where the land is sought to be entered as agricultural. They do not extend to circumstances where the party asserting the nonmineral character of the land asserts title under an in praesenti grant, as Idaho does here.

Thus, here, even if Idaho should apply for a patent, 4/ this does not mean that the priority of the State's interest should be determined by the date on which patent application is filed. Strictly speaking, the State never had an "entry" upon the land at issue here; its interest is somewhat stronger than that. Idaho is favored in this proceeding by the presumption that title to the land passed under either the Enabling Act or the Act of January 27, 1927. To assign the State the ultimate burden of proof in the contest proceeding which is necessary in this matter, would run contrary to this presumption, since the State already is the presumptive holder of legal title to the land at issue. 5/ The State's interest became a matter of public record with BLM

4/ Although the authority to issue patents under 43 U.S.C. §§ 871a (1970), has been repealed, § 705(a), P.L. 94-579, 90 Stat. 2792 (1976), such action in no way affected the interest which vested under 43 U.S.C. § 870 on Jan. 27, 1927.

5/ The allocation of the burden of proof as to mineral character of land is not altogether clear. In 1903, registers and receivers of the United States Land Office were instructed by the following rule:

"When a school section is identified by the Government survey and no claim is at the date when the right of the state would attach, if at all, asserted thereto under the mining or other public land laws, the presumption arises that the title to the land has passed to the state, but this presumption may be overcome by the submission of a satisfactory showing to the contrary. Applications presented under the mining laws covering parts of the school section will be disposed of in the same manner as other contest cases."

(32 L.D. 39 (1903), emphasis added).

either in 1912 when the plat of survey was filed or upon enactment of the Act of January 27, 1927. The mining claimant's interest was not a matter of land office record until after its patent application was filed in 1979.

With respect to mineral patent applications, Departmental regulation 43 CFR 3862.5-1, provides that "No entry will be allowed until the authorized officer has satisfied himself, by careful examination, that the proper proofs have been filed upon the points indicated in the law and official regulations." As a consequence, we find that the record before us does not adequately present the necessary proofs to permit adjudication of these conflicting claims, and hold that appellant has sustained the burden of its protest by establishing error in BLM's decisionmaking process. BLM erroneously dismissed the State's protest despite the existence of presumptive title held by the State. BLM's decision must therefore be reversed. Furthermore, since the State has requested a hearing on the mineral character of the land as well as the validity of the subject claims, the request is granted. At hearing the mining claimant shall have the ultimate burden of proof. The burden of going forward at hearing shall, however, be upon the State. The principal issue to be decided at the hearing is whether, on January 25, 1927, there was a valid discovery on each claim contested by the State. See Mangan & Simpson v. Arizona, supra. A subsidiary issue is whether the land in sec. 16 was mineral in character on the date of survey in 1912.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed

from is reversed and the case referred to the Hearings Division for assignment to an Administrative Law Judge whose decision shall be final for the Department unless it is appealed pursuant to 43 CFR 4.410.

Franklin D. Arness
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

Gail M. Frazier
Administrative Judge